

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1025

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

BS
PBS

Docket No. 77-1025

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

NIKOLAS PANTELEAKIS,
Defendant-Appellant

On Appeal From The United States District Court
For The District Of Vermont At Criminal
Action No. 76-9-1

BRIEF FOR APPELLANT, NIKOLAS PANTELEAKIS

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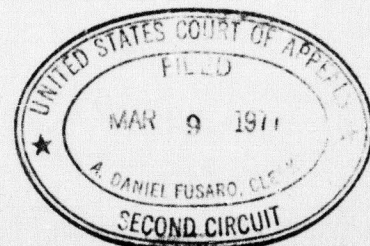


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PRELIMINARY STATEMENT

This is an appeal by Nikolas Panteleakis, Defendant, who was tried by a jury in the United States District Court, District of Vermont, the Honorable Albert W. Coffrin, presiding, and found guilty on three separate counts as follows:

1. One Count of receiving and concealing stolen goods which were part of interstate commerce, all in violation of Sections 2315, 2, Title 18, United States Code;

2. Transporting in interstate commerce stolen goods all in violation of Sections 2314, 2, Title 18, United States Code;

3. One Count of conspiracy to commit offenses against the United States, to wit: to violate Sections 2314 and 2315 of Title 18, United States Code.

ISSUES PRESENTED

1. Should the Judgment of the District Court be reversed and judgment entered for the Defendant in that the District Court when asked for supplemental instructions by the Jury failed to answer their questions and further partially directed their verdict.

A. Was the Court's supplemental instruction tantamount to a partial direction of verdict?

B. Did the trial Court's supplemental instruction or lack of further instruction as requested by both the Jury and the Defendant fail to state the law with regard to the formation of intent and willful participation?

C. Did the combination of the lack of supplemental instructions and the partial direction of verdict create in the Jury's mind an impression that the trial Court believed the Defendant guilty so prejudicially as to suggest the result of a guilty verdict?

STATEMENT OF THE CASE

Nikolas Panteleakis was indicted by Grand Jury for an alleged violation of Title 18 U.S.C. 2314, 2, 2315, 2 and a general count of conspiracy to commit these offenses. The indictment consisted of three counts: one count in conspiracy, one count in receiving and concealing and one count in willfully and knowingly transporting stolen goods into interstate commerce. The crimes allegedly occurred during December of 1974.

The case came on for trial by Jury on June 22, 1976 in the Federal District Court, District of Vermont at Burlington, Vermont, the Honorable Albert W. Coffrin presiding. Said trial resulted on July 25, 1976 in a verdict of guilty against the Defendant on all three counts of the indictment. The post-conviction motions of the defendant Nikolas Panteleakis for a new trial were heard on November 9, 1976 and denied by the Honorable Albert W. Coffrin. The Notice of Appeal was filed on November 9, 1976.

STATEMENT OF FACTS

Previous to the times material to the present conviction, Defendant had a history of "bad check" charges in State Court, especially concentrated around the Lowell, Massachusetts area. During the month of November, 1974, one Larry Thibeault who had previously known Defendant and his history of State charges in Massachusetts and one William

Scott came to the Maverick Restaurant in Brattleboro, Vermont where Defendant was running a restaurant business. Thibeault and Scott were attempting to promote a "dinner club" in the Maverick Restaurant. During the period from early November, 1974 until early January, 1975, Defendant testified that at many and diverse times Larry Thibeault and William Scott threatened Defendant with exposure to the Lowell, Massachusetts Police if he did not comply with their wishes. Some of the "favours" granted by Defendant to Scott and Thibeault were as follows:

1. Fee lodging at the Stone Fence Motel for a period of six to eight weeks;
2. Free food and alcoholic beverages at the Maverick Restaurant;
3. Borrowing Defendant's car;
4. One Thousand Dollars to bail out William Scott from a Pennsylvania jail; (T. 263-267)

At a later time another witness, Arthur Strahan, was also coerced by Larry Thibeault to put up bail money to get Thibeault out of jail. (T. 235-236)

In this atmosphere Larry Thibeault made contact with one Kermit White who had a number of stolen U. S. Bonds which he wanted to sell. The testimony is conflicting at best as to how the bonds were bought, who paid for them, in what amounts and exactly in what area of the Maverick Restaurant the purchase

was made. However, it is clear that the bonds were purchased from Kermit White in the confines of the Maverick Restaurant and that Defendant had knowledge of the transaction. Both Thibeault and Scott maintained at trial that the Defendant Panteleakis, actively participated in the conspiracy to purchase and later sell stolen bonds and both testified that he, the Defendant Panteleakis, put up some money toward their purchase although in conflicting amounts. John Lavers, another alleged co-conspirator, believed that Defendant Panteleakis to be involved in the purchase of the bonds but did not testify that he saw Defendant Panteleakis in any way purchase the bonds from Kermit White. The bonds were purchased for Five Hundred Dollars (\$500) from Kermit White at the Maverick Restaurant and were later taken by John Lavers to Ayerscliff, Quebec where he attempted to sell them and was subsequently arrested. During January of 1975 Defendant was against persuaded "by Larry Thibeault" that if he did not leave the Maverick Restaurant and the environs of Brattleboro, Vermont, that the Lowell, Massachusetts Police would know where he was. Defendant Panteleakis at that point went to Rhode Island where he stayed under the assumed name of Nick Pappas to avoid what he felt was a threat of prosecution on the check charges in Massachusetts. (T. 106 and 112)

SHOULD THE JUDGMENT OF THE DISTRICT COURT BE REVERSED AND JUDGMENT ENTERED FOR THE DEFENDANT IN THAT THE DISTRICT COURT WHEN ASKED FOR SUPPLEMENTAL INSTRUCTIONS BY THE JURY FAILED TO ANSWER THEIR QUESTIONS AND FURTHER PARTIALLY DIRECTED THEIR VERDICT.

On June 25, 1976 at 12:15 p.m. the Jury was given the case to deliberate. After three and one-half (3 1/2) hours the Jury requested additional instruction from the Court based on two questions: (T. 387-388)

"1. If the Defendant was coerced (Blackmailed) into the conspiracy, can he be deemed a willful participant?

2. If the Defendant was felt to be coerced into conspiracy and yet was felt to expect to share in the proceeds of the sale of the bonds, does this make him a willful participant?"

After discussion with counsel out of the hearing of the Jury and over counsel for the Defendant's objection, the Court advised the Jury as follows: (T. 393 and 394)

"The answer I must advise you is as follows:
There is no evidence in this case from which it can be found that the Defendant was coerced into becoming a member of the conspiracy which may have existed, and for that reason the

Court is incapable of answering your question."

The Court re-read then its portion of the charge pertaining to knowing and willfully doing of an act. Then, after further discussion with counsel and upon further questioning from Foreman Martin, the Court said on Page 396 of the Transcript:

"Well, it is very difficult to know how far the Court can get into the question about which you are deliberating. However, I think that the Court can indicate that there was some testimony to that effect, but it did not pertain to anything having to do with the conspiracy as far as these particular bonds or securities are concerned and I don't know that I should go any further than that."

The Court then re-read parts of his charge with regard to conspiracy on Pages 396-402 of the Transcript.

It is clear in the Federal Courts that the trial Judge may comment on the evidence of a trial. Beginning with Starr v. United States, 153 U.S. 614 (1894). It is also clear that the Court has given broad discretion to trial Judges in summarizing the evidence or marshalling the facts. United States v. Tourine 428 F.2d 865 (2d Cir. 1970) and United States v. Tramunti 513 F.2d 1087 (2d Cir. 1975)

However, equally clear is that the trial Judge may not

indiscriminantly comment except in the most exceptional cases that the Defendant is in his opinion, guilty. U.S. v. Murdock 290 U.S. 389 (1933), United States v. Woods 252 F.2d 334 (2d Cir. 1958), See generally Power to Comment on the Issue of Guilt: Trial By Jury or Trial By Judge, Vill. L. R. Vol. 9, Spring 1964, Pgs. 440-446. Nor can the trial Judge comment or question a witness in such a way that the sum total of the comments and questions he might promulgate during the trial give the Jury the clear indication that the Court feels the Defendant guilty. U. S. v. Salazar 293 F.2d 442 (2d Cir. 1961), U. S. v. Stephens 486 F.2d 915 (9th Cir.), U. S. v. Fry 304 F.2d 296 (7th Cir. 1962).

It has been a long and well established rule that a partial direction of verdict in a criminal case is improper and constitutes reversible error. The conclusion that a verdict has been partially directed has been reached in a variety of ways. An instruction deciding a material fact issue adversely to the Defendant has been considered a partially directed verdict of guilty and prohibited in Mims v. U. S. 375 F.2d 135 and the refusal to submit an issue of fact to the Jury has similarly been held to be reversible error. Bryan v. U. S. 373 F.2d 403 In fact "no matter how conclusive evidence in a case may be", the Court in U. S. v. Hayward 420 F.2d 142 held that the rule against directed verdicts of guilt included situations in which the trial Court's instructions

fell short of directing a guilty verdict, but nevertheless had the effect of doing so by eliminating relevant issues from the Jury's consideration.

The Defendant would ask the Court to examine the trial Court's supplemental instructions in light of the following questions:

1. Was the Court's supplemental instruction tantamount to a partial direction of verdict?
2. Did the trial Court's supplemental instruction or lack of further instruction as requested by both the Jury and Defendant fail to state the law with regard to the formation of intent and willful participation?
3. Did the combination of the lack of supplemental instructions and the partial direction of verdict create in the Jury's mind an impression that the trial Court believed the Defendant guilty so prejudicially as to suggest the result of a guilty verdict.

WAS THE COURT'S SUPPLEMENTAL INSTRUCTION TANTAMOUNT TO
A PARTIAL DIRECTION OF VERDICT?

According to the ABA Standards Trial By Jury §5.3(a),
the Court shall give appropriate additional instructions in
response to the Jury's request unless:

1. The Jury may be adequately informed by directing
their attention to some portion of the original
instructions;
2. The request concerns matters not in evidence
or questions which do not pertain to the law of
the case; or
3. The request would call upon the Judge to ex-
press an opinion upon factual matters that the
Jury should determine.

There was ample evidence during the trial that not only
were Thibeault and Scott coercing Defendant Panteleakis to pur-
chase their food, liquor and motel bill for many weeks, but
to further pay for the bailing out of William Scott in the
amount of one thousand dollars (\$1,000) and the borrowing of
Defendant's car. (T. 265, 266 & 267) Thibeault and Scott
threatened Defendant Panteleakis that they would turn him in
to the Lowell, Massachusetts Police where Defendant felt he
might have to go to jail. Further, there is evidence that
Larry Thibeault attempted to blackmail witness Arthur Strahan
by seeking to get Mr. Strahan involved in the purchase and dis-

position of the bonds subject of this case, if Strahan did not bail him out of jail. (T. 235, 236) In the face of that and over objection (T. 393) the Court instructed the Jury "there is no evidence in this case from which it can be found that the Defendant was coerced into becoming a member of the conspiracy which may have existed." The Court clearly took away by partially directing the Jury to do so, the Jury's fact-determining power. U. S. v. Hayward 420 F.2d 142, Mims v. U. S. 375 F.2d 135

Even more meaningful is that the Court mandated his supplemental instruction be applied to the second question of the Jury as well. The second question clearly dealt with the Defendant Panteleakis' state of mind and there is no question that there is ample evidence to support that his state of mind was fearful of Thibeault of Scott and extraordinarily willing to do things that he did not want to do in response to that fear. It is, of course, the Jury's sole province to determine credibility of witnesses and even though Defendant Panteleakis maintained that he did not participate in the purchase and disposition of the bonds, the Jury could have chosen to disbelieve him on that point. They further could have found that his participation, if any, was unwillful, unknowing or involuntary and without the specific intent to do something which the law forbids. These are all questions of fact which could have been found from the evidence in this case, and should have been

found by the Jury alone. The Jury's questions were clearly directed to the Court with that in mind and the Court clearly directed the verdict against the Defendant by charging the Jury that there was no evidence in the case from which it could be found.

Because the trial Court partially directed a verdict deciding a material fact issue adversely to the Defendant, and further by eliminating relevant issues from the Jury's consideration the judgment of the District Court should be reversed.

DID THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTION OR LACK OF FURTHER INSTRUCTION AS REQUESTED BY BOTH THE JURY AND DEFENDANT FAIL TO STATE THE LAW WITH REGARD TO THE FORMATION OF INTENT AND WILLFUL PARTICIPATION?

The re-instruction of a Jury is within the discretion of the trial Court. U. S. v. Wharton 433 F.2d 451 (1970) However, the discretion certainly is not unfettered. In the instant case the Jury was confused and required additional direction. In the still leading case on this question Bollenbach v. U. S. 326 U.S. 607 (1946) Justice Frankfurter spoke as follows at pages 612-613:

"Discharge of the Jury's responsibility . . . depends on discharge of the Judge's responsibility to give the Jury the required guidance by a lucid statement of the relevant legal criteria. When a Jury makes explicit its difficulty, a trial Judge should clear them away with concrete accuracy."

In U. S. v. Bolden 514 F.2d 1301 (1975), the D. C. Circuit went on to say:

"Particularly where a difficult legal issue such as intent, which is not precisely defined by the statute, is the subject of the Jury's inquiry, the trial Court should carefully inform the Jury of the law, and not allow the troubled Jury to rely

on a layman's interpretation of a superficially simple but actually complex statute."

In the instant case it was made clear to the Court by defense counsel that the Defendant felt that the willful nature of the Defendant and the ability to form a specific intent were the central issues about which the Jury was asking. (See generally the Transcript pages 387-402) The only language regarding specific intent or a willful nature of the participant which the Court chose to re-instruct the Jury on was on page 394 of the Transcript where he immediately repeated his standard instructions on voluntary, intentional, willful conduct. Even after that instruction the Foreman requested of the Court what to do about the Jury's second question. The second question of the Jury even more strongly points to the Jury's concern with the willing nature of the Defendant and his ability to form the specific intent requisite to commit a crime.

The Court failed to answer the juror's question and give appropriate additional instructions and the judgment of the District Court should be reversed. Bollenbach v. U. S. 326 U. S. 607 (1946), U. S. v. Bolden 514 F.2d 1301 (1975), Powell v. U. S. 347 F.2d 156 (1965)

DID THE COMBINATION OF THE LACK OF SUPPLEMENTAL INSTRUCTIONS AND THE PARTIAL DIRECTION OF VERDICT CREATE IN THE JURY'S MIND AN IMPRESSION THAT THE TRIAL COURT BELIEVED THE DEFENDANT GUILTY SO PREJUDICIALLY AS TO SUGGEST THE RESULT OF A GUILTY VERDICT?

While it is clear that throughout the transcript it cannot be shown that the trial Court actually expressed his opinion on guilt in so many words, it appears equally clear that the influence of the Judge's re-instruction was so pointed that the Jury interpreted the Judge's opinion of guilt against the Defendant.

While the fact situation in the instructions were quite different the Second Circuit following Bollenbach in U. S. v. Casale Car Leasing, Inc. 395 F.2d 707 (1967) held that:

"The question was not whether guilt could be spelt out of the record but whether guilt had been found by a Jury according to procedure in the standards appropriate for criminal trials in Federal Courts, and failure to submit a case to a Jury under proper instructions would require reversal even if the record contained evidence that would support the finding of guilt under a correct view of law."

The Defendant in this case urges the Court to adopt the view that the trial Court below not only partially directed a

verdict and failed to re-instruct the Jury properly with regard to the factual and legal questions they asked, but the combination of those events created an impression in the Jury's mind that the Court felt the Defendant guilty to such a degree that the judgment should be reversed under a rationale of the cases following United States v. Murdock 290 U.S. 389 (1933), United States v. Salazar 293 F.2d 442 (1961)

In a case that is factually remarkably similar to the instant case, Justice Frankfurter in delivering the opinion of Bollenbach v. United States 326 U.S. 607, brings out another point in the instant case where he said at page 612:

"(The influence of the trial Judge on the Jury is necessarily and properly of great weight), Starr v. United States 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the Judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge."

In the case below the Jury was out for three and one-half hours (3 1/2) previous to requesting instructions and the Foreman then indicated that the Jury was struggling at that point. After the Judge's re-instructions, the Jury was back with a

verdict of guilty within a very few minutes. The significance of this vital "fact" was recognized in the Bollenbach case by Justice Frankfurter at page 614. And the reasons for reversal are poignantly re-iterated by the facts of the instant case.

CONCLUSION

By reason of the errors above-cited, the judgment of the United States District Court, for the District of Vermont, should be reversed. Judgment should be entered for the Defendant on the grounds that the District Court committed reversible error in his supplemental instruction or in the alternative, the case for the Defendant should be remanded for a new trial because of the trial Court's error in partially instructing a verdict of guilty.



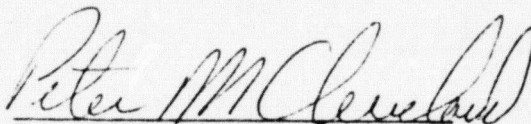
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CERTIFICATE OF SERVICE

I do hereby certify that on the 9th day of March, 1977, I made service of the BRIEF FOR THE APPELLANT upon the UNITED STATES OF AMERICA, by mailing two copies of the same to its attorney of record, George W. F. Cook, United States Attorney, Federal Courthouse, Rutland, Vermont.


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